The defendant by his signature to the promissory note and to the acknowledgment at the foot of the promissory note has acknowledged receiving the sum of $5,200 and the onus is on him to show that he did not receive the $5,200. This, in my view, he has failed to do.

I am unable to rely on the entries made by the defendant in his diary as regards the repayments he made towards the three previous loans. The plaintiff's book of account appears to me to be properly kept and I accept the plaintiff's evidence that all previous loans except the sum of $597 had been settled by the 12th August, 1958 and that the loan of the 3rd January, 1958, was for $2,300 and not $2,000.

The story of the defendant that he asked the plaintiff to consolidate what was due on the three previous loans into one note so as to make things easier for him is, I think, improbable and I am unable to accept his evidence on the matter. I find that the defendant would lie when it suited him. His diary disclosed that he was in great financial difficulties early in August, 1958. I accept the plaintiff's evidence that $5,200 was lent on the 12th August, 1958.

There will be judgment for the plaintiff in the sum of $8,097.13 and costs and further interest on $5,200 at 18% per annum from the 15th April, 1961, until judgment.

Judgment for the plaintiff.

Solicitors: *Braddell Bros.*; *N. A. Christopher.*

WHITE HUDSON & CO. v. ASIAN ORGANIZATION LTD.

[P.C. (Lord Guest, Lord Pearce and Lord Upjohn) November 16, 1964]

[Privy Council Appeal No. 2 of 1963]

Trade Marks — Passing off — Sweet wrappers — Distinctive get-up — Risk of confusion — Special market condition in Singapore — Type of customers.

This was an action in which the appellants claimed an injunction to restrain the respondents from passing off or attempting to pass off medicated sweets not manufactured by the appellants as and for the goods of the appellants. The appellants carry on business as manufacturers of sweets in England and these were sold through their agents in Singapore. The sweets were wrapped in red coloured cellophane wrappers on which is printed the name "Hacks". The respondents were manufacturers' agents in Singapore and they imported into Singapore medicated cough sweets manufactured in Holland. The sweets were of similar size and shape and colour to the appellants' sweets. They were originally wrapped in white cellophane paper but from May 1958 each sweet was wrapped in red coloured wrapper on which was printed the name "Pecto". The trial judge granted the injunction but his decision was reversed by the Court of Appeal ([1962] M.L.J. 139). On appeal to the Privy Council,

Held: (1) the learned trial judge was justified in holding (a) that the get-up of the goods had become distinctive and that it was associated and identified with them; (b) that in the circumstances there was a probability of confusion between the goods of the appellants and of the respondents; and (c) that in considering the conditions in Singapore and the fact that the get-up is all important for the non-English speaking members of the public, the similarity of the get-up of the sweets was such as to be calculated to deceive. It was unnecessary to prove actual deception;

(2) the design of the wrapper need not be novel provided that the get-up was distinctive of the appellants' goods and had been identified with them.

Cases referred to:—

(1) *John Brinsmead & Sons Ltd.* v. *Brinsmead* (1913) 30 R.P.C. 489.

(2) *Johnston* v. *Ewing* (1882) 7 App. Cas. 219.

PRIVY COUNCIL APPEAL.

Kenneth Johnston Q.C. (*Geoffrey Tompkin* with him) for the appellant.

John Whitford for the respondent.

The judgment of the learned trial judge which was restored by their Lordships of the Judicial Committee of the Privy Council was as follows:

Tan Ah Tah J.: The plaintiffs are a company incorporated in England and are manufacturers of medicated cough sweets. These sweets have been sold by the plaintiffs through their agents in Singapore since 1953. Each sweet is wrapped in an orange coloured wrapper on which is printed the name "Hacks" and a list of what are called active constituents of the sweet. At the time of importation into Singapore, the sweets are contained in tins, but when they are distributed to retailers the sweets are usually taken out of the tins and placed in glass jars and are thus displayed for sale. According to the evidence, the vast majority of retailers display the sweets for sale in this manner; only a few retailers sell the sweets out of the tin.

The defendants are a company incorporated in Singapore and carry on the business, *inter alia*, of manufacturers' agents. In March 1958 they commenced to sell in Singapore medicated cough sweets manufactured by the Red Band Confectionery Works, Holland. At the beginning the sweets were wrapped in white cellophane paper, but in May 1958 this was changed and from that time onwards each sweet was wrapped in an orange coloured wrapper on which was printed the name "Pecto" and a list of ingredients purporting to show the composition of the sweet. The manner in which "Pecto" sweets were wrapped in their wrappers was very similar to the way in which "Hacks" sweets were wrapped.

The plaintiffs' claim is for an injunction to restrain the defendants from passing off or attempting to pass off and from enabling others

to pass off medicated sweets not of the manufacture of the plaintiffs as and for the goods of the plaintiffs and for consequential relief.

In order to succeed, one of the points the plaintiffs must prove is that their get-up has become distinctive of their goods and that by using it and making it known in relation to their goods, they have caused it to be associated or identified with those goods. On this point I find that the following facts have been proved. The plaintiffs commenced to sell "Hacks" sweets in 1953, five years before "Pecto" sweets came on the market. It was the first time that medicated cough sweets were sold in loose form, and not by the tin or bottle, in Singapore. Customers therefore came to recognise the sweets by their wrappers. The vast majority of non-English speaking customers, who were unable to read the words printed on the wrappers, asked for the sweets by describing them as "red paper cough sweets." In 1953 the amount realised from the sale of "Hacks" sweets was $24,000. In 1957 the amount realised from such sales had risen to $156,160. In 1959 the amount had risen still further to $240,030. There was a large number of retailers, about 2,000 in all, selling these sweets in Singapore. Considering that four sweets only cost 10 cents it is obvious that an enormous number of sweets have been sold. Having regard to all these facts, I find it proved that the plaintiffs' get-up became distinctive of their goods and that it was associated or identified at all material times with the plaintiffs' goods and no others.

The next point that the plaintiffs must establish is that the get-up of "Pecto" sweets is such that in the circumstances of this case there is a probability of deception. I have already stated that the vast majority of retailers display "Hacks" sweets for sale in loose form by putting them in glass jars. There are no labels on these jars and the only way in which the ordinary customer can recognise the sweets is by their wrappers. Most non-English speaking customers, as I have already stated, describe the sweets as "red paper cough sweets." Evidence was given by witnesses called by the plaintiffs to the effect that some retailers kept both "Hacks" and "Pecto" sweets in the same glass jar and displayed them for sale in that manner. One of these witnesses whose name is Abdul Wahid said that he went to a number of shops and asked for "Hacks" sweets and that at six of these shops he was sold "Hacks" and "Pecto" sweets mixed together. I accept the evidence of this witness and of the other witnesses to whom I have just referred. It is in my opinion clear from such evidence and from the other facts and circumstances which have been proved in this case that there is a probability of confusion between "Hacks" and "Pecto" sweets. I find that the similarity of the get-up of "Pecto" sweets to that of "Hacks" sweets is such as to be calculated to to deceive and I am satisfied that what the defendants have done has given rise to a probability of deception.

It is significant that when Mr. Anthony Ng Eng Hua, who was then a joint managing director of the defendant company, was asked in cross-examination how he expected illiterate people to distinguish between the two kinds of sweets he replied that he had not thought of the answer to that question. In my opinion he found himself in this difficulty because in truth non-English speaking people, who formed the majority of the purchasers of "Hacks" sweets, could not be expected to distinguish between the two kinds of sweets in the circumstances in which they were sold by retailers. In this connection it should be noted that neither the name "Hacks" nor the name "Pecto" is printed in Chinese characters or any other Asian language on the wrappers.

It is contended by counsel for the defendants that the get-up used by the plaintiffs was common to the trade. On this point it is relevant to observe that medicated cough sweets were sold in loose form, as I have said, for the first time in Singapore in 1953 and that the orange coloured wrapper used for "Hacks" sweets was not imitated by any other firm or company until 1958, when it was imitated by the defendants. During the period of five years, therefore, "Hacks" sweets were the only medicated cough sweets which were sold in orange coloured wrappers in Singapore. In these circumstances there is, in my opinion, no justification for saying that the get-up was common to the trade.

Counsel for the defendants has referred to the evidence which shows that the name "Hacks" has appeared in newspaper advertisements and on vans and cinema slides and has been announced on Rediffusion. He relies on the statement made by one of the witnesses called on behalf of the plaintiffs that the whole object of the advertising campaign is to publicise the name "Hacks." In doing so, he contends that it is the name "Hacks" which is significant and that intending customers know the plaintiffs' sweets by that name. He further contends that as the name "Pecto" is clearly printed on the defendants' wrappers and has also been widely advertised, the defendants have done all that can be expected of them to distinguish their goods from the plaintiffs' goods. In considering these arguments it must be borne in mind that the majority of purchasers of the sweets are unable to read English, and as there are no Chinese characters or any other Asian script on the

wrappers, there is nothing to assist such purchasers to distinguish "Pecto" sweets from "Hacks" sweets. In the circumstances in which the sweets are sold, such purchasers cannot associate the name "Hacks" with the plaintiffs' sweets because they cannot read English. In short, so far as non-English speaking members of the public are concerned, the get-up is all-important in this case, while the name is insignificant. I have already stated my view that the similarity of the get-up of "Pecto" sweets to that of "Hacks" sweets is such as to be calculated to deceive.

For the reasons which I have indicated the plaintiffs have, in my judgment, established their claim to relief against the defendants. There will be an injunction restraining the defendants their servants and agents from offering for sale, selling or otherwise dealing in medicated cough sweets not manufactured by the plaintiffs and wrapped with the defendants' "Pecto" wrapper without clearly distinguishing such wrapper from the plaintiffs' "Hacks" wrapper. The defendants will deliver up their "Pecto" wrappers to the plaintiffs for destruction. The Registrar will hold an inquiry as to what damages the plaintiffs have sustained by reason of the acts of the defendants the repetition of which is restrained by the foregoing injunction. The defendants will pay the plaintiffs' costs of this action, but the costs of the inquiry as to damages are reserved.

The defendants appealed to the Court of Appeal and their appeal was allowed ([1964] M.L.J.139). The plaintiffs then appealed to the Privy Council and their Lordships restored the judgment of Tan Ah Tah J.

The judgment of the Lords of the Judicial Committee was delivered by,

Lord Guest: This is an appeal by leave against an order of the Court of Appeal of the State of Singapore reversing the order of Mr. Justice Tan Ah Tah. The appellants were the plaintiffs and the respondents were the defendants in an action for passing off brought by the appellants. By their statement of claim the appellants claimed an injunction to restrain the respondents from passing off or attempting to pass off and from enabling others to pass off medicated sweets not of the manufacture of the appellants as and for the goods of the appellants. The facts as found by the trial judge were as follows.

The appellants carry on business as manufacturers of sweets in England. From 1953 medicated cough sweets manufactured by the appellants were sold through their agents in Singapore. Each sweet is wrapped in a red coloured cellophane wrapper on which is printed the name "Hacks" and a list of ingredients. Although the sweets are imported into Singapore in tins, when they are received by retailers they are usually displayed for sale in glass jars, from which containers the sweets are sold loose sometimes in very small quantities.

The respondents are a company incorporated in Singapore and carry on business there as *inter alia* manufacturers' agents. In March 1958 they began to import into Singapore medicated sweets manufactured in Holland. These sweets are of similar size and shape and colour to the appellants' sweets. Originally they were wrapped in white cellophane paper, but from May 1958 each sweet was wrapped in a red coloured wrapper on which was printed the name "Pecto" and a list of ingredients. The wrapper was very similar to that used by the appellants on their sweets. The only reason given by the respondents' managing director for the exchange was that the white paper sweated on the sweets and that this showed through the white paper. The respondents' sweets are normally transferred by retailers from tins into glass jars in which they are displayed for sale, and like the appellants' sold loose.

When the appellants commenced to sell "Hacks" sweets in 1953, this was the first time that medicated cough sweets had been sold in loose form and not in tins. The trial judge has found "The vast majority of non-English speaking customers, who were unable to read the words printed on the wrappers, asked for the sweets by describing them as 'red paper cough sweets'." As there was no label on the glass jars in which the sweets were displayed, the only way in which these customers could recognise the sweets was by their wrappers.

The sales of the appellants' sweets amounted in 1953 to $24,000, in 1957 to $156,160, and in 1959 to $240,030. There were about 2,000 retailers selling these sweets in Singapore, and as four sweets cost about 10 cents it is apparent that between 1953 and 1958 a great quantity of sweets had been sold.

The essence of a passing off action is that A is not entitled to represent his goods as the goods of B or enable someone else to do so. (*John Brinsmead & Sons Ltd.* v. *Edward George Staleny Brinsmead* [1]). The first matter which a plaintiff must prove in a passing off action is that the get up of his goods has become distinctive of these goods and that it was associated or identified with them. This is a question of fact and upon this the appellants have the finding of the trial judge in their favour. Their Lordships are satisfied that the trial judge was justified in so finding. The fact that non-English speaking customers were in the habit of asking for "red

paper cough sweets" shows clearly that to these customers the get up of the red coloured wrapper had become associated or identified with the appellants' goods. An attempt was made by the respondents to show that the red coloured wrappers were common to the trade. This attempt failed, as it was clear on the evidence that prior to 1953 no wrapper similar to that used on the appellants' sweets had ever been used on sweets whether medicated or otherwise in Singapore, and from 1953—1958 the appellants' sweets were the only sweets so wrapped which were sold in Singapore.

The second matter which in order to succeed the plaintiffs must establish is that in the circumstances there is a probability of confusion between the goods of the plaintiffs and of the defendants. This again is a question of fact. Important evidence was given for the plaintiffs and accepted by the trial judge that some retailers in Singapore displayed both "Hacks" and "Pecto" sweets in the same jar. Further evidence was given by a witness who visited six shops in Singapore. He asked for "Hacks" sweets and he was on each occasion given "Hacks" or "Pecto" sweets mixed together. It may well be that to an English speaking customer the word "Pecto" on the respondents' sweets would be sufficient to distinguish their sweets from those of the appellants. But according to the trial judge the majority of purchasers of these sweets are unable to read English and accordingly "Pecto" is not sufficient to distinguish the respondents' goods.

As the trial judge succinctly expresses it, "so far as non-English speaking members of the public are concerned the get up is all important in this case, while the name is insignificant". The courts will have regard to conditions existing in foreign markets and to the type of customers (*Johnston* v. *Orr Ewing* [2]).

Upon this evidence the trial judge found that the similarity of the get up of "Pecto" sweets and "Hacks" sweets is such as to be calculated to deceive. No case of actual deception was proved, but this is not necessary. In their Lordships' view this finding of the trial judge was fully justified on the evidence.

Upon these findings the trial judge made an order restraining the respondents from offering for sale or otherwise dealing with medicated cough sweets not manufactured by the appellants and wrapped with the "Pecto" wrapper without clearly distinguishing such wrapper from the appellants' wrapper.

The Court of Appeal (Buttrose and Ambrose JJ., Wee Chong Jin J. dissenting) reversed the decision of Tan Ah Tah J. The majority of the Court of Appeal held that there was nothing in the wrapper which constituted a peculiar — a novel or capricious design — as a distinguishing feature of the sweet. In their Lordships' view it is not necessary that the design should be novel, provided the get up is distinctive of the appellants' goods and has been identified with them. The majority also thought that the appellants were claiming a right to a monopoly of coloured paper wrappers, but this is not the order which the appellants were granted. Moreover, in their Lordships' view the Court of Appeal fell into error in rejecting as inadmissible evidence which had rightly been accepted by the trial judge, and upon this view they held that the appellants had failed to prove their case of passing off.

Their Lordships express their entire satisfaction with the opinion of Tan Ah Tah J. and agree with his conclusion. They prefer the dissenting judgment of Wee Chong Jin J. to the opinions of the majority of the Court of Appeal.

For these reasons their Lordships will report to the Head of Malaysia their opinion that the order of the Court of Appeal of the State of Singapore, dated 19th January 1962 should be set aside with costs, and the order of Tan Ah Tah J., dated 11th August 1961 restored, and that the respondents should pay the costs of the appeal.

Appeal allowed.

Solicitors: *Linklaters & Paine; Coward, Chance & Co.*

PUBLIC PROSECUTOR v. ANTHONY WEE BOON CHYE & ANOR.

[F.C. (Thomson L.P., Barakbah C.J. (Malaya) and Wylie C.J. (Borneo)) November 16, 1964]

[Singapore — Special Civil Case No. 1 of 1964]

Extradition — Fugitive Offenders Act, 1881, ss. 13-19, Part II — Order-in-Council of 2nd January, 1918 — Whether applicable to Singapore after incorporation of Singapore in Malaysia — Continuance of existing laws — Constitution of State of Singapore, Art. 105(1) — Malaysia Act, 1963, s 73 — U.K. Malaysia Act, 1963, s. 3.

Constitutional law — Existing laws — Incorporation of State in Malaysia — Extradition.

By a special case stated by a judge of the High Court in Singapore the following question was referred to the Federal Court "whether in view of the incorporation of the State of Singapore in the independent State of Malaysia the Fugitive Offenders Act, 1881, and in particular Part II thereof is applicable in Singapore".

Held: the Order-in-Council of 1918 and sections 13 to 19 of the Fugitive Offenders Act, 1881, are still part of the law of Singapore in relation to Hongkong notwithstanding the incorporation of Singapore in Malaysia.

Per Thomson L.P.: It would seem clearly to follow as a matter of pure construction that the Order-in-Council of 1918 and sections 13 to 19 of the Fugitive Offenders Act 1881 as read together are part of the "present law" of the State of Singapore and as such are still in force; and that there is nothing in that law which conflicts either